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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

GERONIMO VILLEGAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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44 pp

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that at least under the rule of lenity, respondent's conduct -- placing refuse vials of blood, some contaminated with hepatitis B, which he had taken home from his blood lab, in the bulkhead at the apartment complex in which he lived -- was conduct which, though unsavory and unjustifiable, was not criminally prosecutable under the Clean Water Act, 33 U.S.C. § 1311(a) and § 1319(c), in that the Act outlaws only "discharges" from "point sources" -- a term which the Act's language and structure show to refer to fixed outlets of pollutants at fixed industrial or municipal plants, not random individual polluters or their personal automobiles.

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In the Supreme Court of the United States
October Term, 1993

UNITED STATES OF AMERICA, Petitioner

v.

GERONIMO VILLEGAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Geronimo Villegas respectfully submits this Brief in Opposition to the Petition of the Solicitor General for a writ of certiorari.

STATEMENT OF THE CASE

This case arose from the irresponsible conduct of Respondent Geronimo Villegas in disposing of blood vials, some of which were contaminated with the hepatitis B virus, in some rocks forming a bulkhead at the apartment building at which Villegas lived, adjacent to the Hudson River. Respondent was criminally prosecuted under the Clean Water Act, 33 U.S.C. § 1251 et seq., on the theory that a "discharge" of these "pollutants" had occurred "from" a "point source" into navigable waters.

Partly granting respondent's post-verdict motions,[1] Hon. Edward R. Korman set aside the convictions premised on the so-called "knowing endangerment" provision of the Act, 33 U.S.C. § 1319(c)(3), on the ground that respondent was not shown to have "known" of any danger, much less an "imminent" one, and that indeed, there was no "imminent" danger. However, the district court sustained the verdicts on the charges under 33 U.S.C. § 1319(c)(2), prohibiting "knowing" discharges, but only by adopting the unprecedented holding that a human being is a "point source" under the Act.

A. The Evidence At Trial: On two occasions, once before May 1988 and once before September 1988, respondent Villegas, then part-owner of a blood laboratory, was shown to have placed a number of vials of blood (including five found to contain blood infected with the hepatitis B virus) in the bulkhead behind the condominium complex in New Jersey, which is where Villegas lived. A maintenance superintendent who noticed the vials in a container between the rocks of the bulkhead separating the buildings from the Hudson River testified that the night before he saw the vials, the water had come "[h]igher" than he had ever seen it before (Tr. 73, 83), not only covering the rock formation where he found the vials, but coming "inland a little bit further" and flooding the parking area (Tr. 73, 79-80).

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[1] After the verdicts, Judge Korman appointed present counsel pursuant to the Criminal Justice Act. The Court of Appeals continued counsel's appointment on appeal.

Investigators found some vials in the water in front of the complex after this discovery.

Some four months earlier, a number of other vials had been found by school children on a trip to a Staten Island beach. Fortunately, though some vials had "cracked" (most had, however, remained sealed with stoppers in plastic containers or ziplock bags), no one was injured. The schoolgirl-witnesses testified that they knew that they should not touch the vials, and that they had not done so.

The vials were traced to Plaza Health Laboratories, Inc., of which respondent Villegas was a 50% owner and in the operation of which he did non-technical marketing work. Villegas reportedly stated to investigators that, in around June 1988, after the lab's refrigerator was filled with vials, he had "filled two plastic containers and several plastic zip-lock bags with blood vials and drove them over to where he lived in New Jersey"; then, "[w]hen he got there to the parking lot, he saw the rocks [and] placed two containers and the zip-lock bags into the rocks".[2] The vials found in September matched this description.

A professor of coastal engineering testified for the government that Staten Island was a "likely spot for washup" of

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[2] (GX8 & Tr.132-33). Villegas stated that he had disposed of vials on two other occasions as well, but not near the river. Once, he had put "junk" in the storage room at the condominium complex, including "a small amount of blood vials and needles in a plastic bag and I think Corvac tubes" (Tr. 136). Another time he had put some vials in the garbage can at the Binghamton health club where he used to run a pro shop (Tr. 137). He reportedly intended to put the vials in his incinerator on this occasion, but was attracted to the bulkhead instead.

items drifting in the water from the New Jersey area where Villegas lived. He also stated that water would not often rise over the bulkhead at that location. Rather, it would take a "storm surge", which was a "rare occurrence", the prime time for which is in September as a result of hurricanes or tropical storms (Tr. 329-30).

B. Knowing Endangerment: One Wayne Pizzuti, the Director of immunologic laboratory services at the New Jersey Department of Health, testified that his lab had tested blood in some of the vials retrieved at the condominium in September 1988, and stated that five had been positive for hepatitis B (Tr.346-47). Pizzuti testified that the hepatitis B virus could cause liver damage and that the infection can be fatal (though one infected can also recover). He also said that the virus is contagious, and that, were someone to step on a blood vial containing contaminated blood, the virus could enter the system (Tr. 339). When asked whether it would be "possible for someone who is swimming in water which contains blood that was infected with hepatitis B to contract hepatitis B", this expert answered that he "imagine[d]" so. When pressed by the trial judge to explain what he meant by "imagine", Pizzuti answered that "[i]f circumstances were right, it could be transmitted that way" -- which meant (upon further inquiry) that the person who happened to be swimming next to a vial containing infected blood would have to have "breaks in the

skin or breaks in the mucus membranes so that . . . exposure at those points then you could contract it that way" (Tr. 339-40).

Though purported to be an expert, Pizzuti did not have a ready answer to the question as to what effect the elements -- water, air and sun -- would have on the virus (Tr. 351). Nor did he know even "in general terms" what the effect would be if a contaminated vial were to fall into the water and break (Tr. 51-52). Pizzuti generalized that, if you had a "high enough concentration of the virus", then it could still be infectious. He said, however, that there had not been a high concentration in the vials he had examined (Tr. 355). Pressed by the trial judge, Pizzuti expressed his belief that it would not be likely to contract the disease from swimming (Tr. 356).

Another expert, one Dr. Prince, the senior investigator and the head of the biology lab at New York Blood Center who had also written 200 papers about hepatitis B (Tr. 360), testified that hepatitis B could be "self-limited" and result in recovery, but could also be "quite severe", and on rare occasions could result in death. Prince confirmed Pizzuti's testimony that permeation of skin by the virus would cause infection (Tr. 362). Prince further testified that an extremely small amount of blood on a piece of glass could cause contamination (Tr. 362).

Though Pizzuti had not known the effect of water on the virus, Prince testified that the cool river water would tend to preserve the virus, which is "heat stable" (Tr. 362-63). In fact, Prince's lab had tested five vials that had been retrieved

from the Staten Island beach area a year after the event (Tr. 367). Though stored in a non-refrigerated, heated area (presumably by investigators who did not know the virus' properties), one vial still had tested positive for hepatitis B. (Tr. 367). Out of the jury's presence, Judge Korman inquired on the issue at the core of the "knowing endangerment" charges:

> THE COURT: . . . Doctor, if three or four or five vials like -- of the kinds we have been talking about were dropped in the Hudson River, would you say that that would place any person in imminent danger of death or serious bodily injury?

The witness responded (Tr. 371):

> THE WITNESS: If those vials were to land on the shore and someone were to step on them and puncture their skin, they would be in danger of infection, hepatitis B, yes. Those vials that were infected, of course. They all were not.

The witness concluded, however: "The risk of this happening is low but it is a risk."

For unknown reasons, Villegas' trial counsel, though thus made aware of the expert's highly favorable answer, declined to ask Dr. Prince the same question in the jury's presence (Tr. 372) -- a factor that prompted District Judge Korman to observe, during post-verdict Rule 29 argument, that he believed that trial counsel had been "less then competent in his representation here" (9/16/91 Tr. 32-33, 96-99).[3]

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[3] The district court entertained a motion pursuant to Rule 29(d) for a new trial based on ineffective assistance of trial counsel, contingent on his denying the Rule 29 motion (see 6/16/91 Tr. 96). In granting Mr. Villegas' Rule 29 motion in part, the court did not rule on this contingent Rule 29(d) motion. It did, however, state that, if it was wrong in holding

(continued...)

The remaining proof pertained to whether Villegas "knew" of the "danger": A niece of Villegas who had worked at the lab testified that Villegas had worked at other labs previously (Tr. 247). At Plaza, she had seen him almost every day bringing blood in vials in ziplock bags, which he would put in the refrigerator or number them with Plaza's lab number (Tr. 247-48). She stated, however, that the person who would write a number on the vials or on the request form does not know results of the tests (Tr. 257).

An individual licensed as both a supervisor and technician by the New York City Department of Health (Tr. 260-62) testified that there was an assigned area for hepatitis testing, and the technicians wore a gown and gloves for protection (Tr. 264). About 35-50% of blood samples at Plaza were tested for hepatitis. After a hepatitis test, vials were placed in a rack in the lab; at the end of the day, the rack went into the refrigerator (Tr. 270). Though Villegas would "come and go" in the lab for a few minutes "here and there", the supervisor confirmed that Villegas was "not a technician" (Tr. 271-74).

A part-time pathologist testified that one Dennis Chandra and respondent Villegas were in charge of the lab (Tr. 278-80) and identified a Policy and Procedure Manual kept in the Plaza offices (GX-11, Tr. 283). The witness identified Chandra, not respondent, as the chief contact person for Plaza. Chandra

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[3](...continued)
the evidence insufficient on the "knowing endangerment" counts, then a new trial would have to be held anyway because the instructions had been erroneous on the knowing endangerment issue (Memorandum and Order at 17 n.5, Pet. App. 49a-50a).

apparently had a Ph.D. in chemistry (Tr. 285-86). The witness did not know what Villegas' profession or function was, except that Villegas never carried vials (Tr. 287). After the discovery of the vials, Villegas purportedly told this witness that "it's stupid of me to have done that" (Tr. 285).

Although Villegas' trial counsel did not sum up to the jury using Villegas' statement, that statement included an expression of this defendant's state of mind that negated an inference that he "knew" he had endangered others with his conduct. Explaining why he had disposed of the vials, Villegas said that his "refrigerator was getting full" and went on to explain: "And besides, the thing is, it's in the containers and would not harm nobody, I guess" (GX-8, Tr. 137).

C. The Jury Charge: After extensive consideration, District Judge Korman declined to instruct the jury in accordance with the government's position that a human being is a point source.[4] He

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[4] EPA environmental engineer Durack had testified as a government witness that it was his job to "determine what the point sources are and to make sure that they have permits to control the discharge of pollutants." Durack went on to describe a point source as any of several types: "There are discharge pipes. There are vessels which could be a truck, could be a ship. Or it could be a person or persons" (Tr. 184). Though Durack posited that a "point source" could be a human being, he conceded that his office had never granted a permit for a human being to discharge as point source (192): "Not for the person to put the pollutants in himself, no," he admitted.

District Judge Korman, after struggling with the concept of "point source", ultimately told the jury to disregard Durack's testimony about the meaning of a "point source", and instead charged the jury (see Pet. App. 65a):

(continued...)

decided to tell the jury instead that it could "assume" that "it was a point source", allowing the defendant to reserve his objection on the question of law which in any event, as the district court properly understood, could not be waived because "[i]f it is not a crime, it is not a crime" (Tr. 293; 292-99). In accordance with this plan, the trial court instructed the jury that "[r]emoving pollutants from a container, and a vehicle is a container, parked next to a navigable body of water constitutes a discharge from a point source" (Tr. 470).

D. The Rule 29 Decision: Though Judge Korman was "terribly troubled" by the government's broad argument that a human being is a "point source" (9/16/91 Tr. 90), he sustained Villegas' convictions by determining that a human being is a point source

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[4](...continued)

> Congress chose to distinguish between "point sources" and "non-point sources" with the specific purpose of excluding various kinds of pollution runoff, that is, runoff produced principally by rainfall that cannot be traced to one polluter. Congress did not intend to exempt from regulation any activity that emits pollution from an identifiable point. Congress did not intend by the term "point source" to distinguish between a person who drives a truck to the edge of the Hudson River and dumps blood vials, clearly a point source, and a person who gets out of a truck, takes the vials from the truck, walks to the river's edge and dumps them from his hand. Removing pollutants from a container, and a vehicle is a container, parked next to a navigable body of water and physically throwing the the [sic] pollutant into the water constitutes a discharge from a point source.
>
> In this respect I ask to you [sic] forget and disregard the testimony of Patrick Durack on this issue.

within the meaning of the Clean Water Act. Acknowledging that the image of a human being is not "conjured up" by the definition of "point source" -- defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged", 33 U.S.C. § 1362(14) -- Judge Korman nonetheless was of the view that, where the source of a pollutant is "no mystery" but is rather identified (Tr. 294), then that source -- even if it is a human being -- should be considered a "point source" of pollutants, and that the Act applies to that "discharge". Judge Korman believed that this result was not inconsistent with the statute, since the definition of "point source" does not "exclude" a human being from its ambit. Further assuming -- but citing no authority to support the assumption -- that Congress must have meant to include all pollution other than "nonpoint source" pollution within the criminal prohibitions of the Clean Water Act (Pet. App. 39a),[5] Judge Korman determined that it made

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[5] Judge Korman's conclusions in this regard, like dissenting Circuit Judge Oakes' conclusions, were posited as the statute's purpose without citation to any legislative history or other authority that so suggests. Nor are we aware of any legislative suggestion that Congress' purpose "in specifically proscribing pollution from a 'point source' was to ensure that naturally-induced, random run-off of pollutants would not result in criminal or civil liability under the Clean Water Act", but that all other pollution was within the Act, as Judge Korman construed it (Pet. App. 39a). Congress' purpose was not to exempt some forms of pollution; it was to regulate some forms of pollution. Had Congress meant to reach everything except identified exemptions, it could have said so.

Indeed, Congress never defined "non-point source" pollution in the statute. Its statement that run-off is not "point source" pollution merely shows an intent not to regulate that type of pollution (because it is near impossible to do so), (continued...)

no sense to hold that "'point source' does not encompass the deliberate discharge of pollutants produced in the course of a waste-generating activity, merely because a person directly deposits those pollutants into the water" (Pet. App. 39a-40a). Thus, said the district court, a human being should be deemed a "point source" even if that person is only an "intermittent polluter", since the statute defines a discharge to include "any addition of a pollutant to navigable waters from any point source" (Pet. App. 42a, citing 33 U.S.C. § 1362(12)) (emphasis added by Judge Korman).

In the very next breath, however, Judge Korman somewhat contradictorily agreed that Congress did not intend the Clean Water Act to apply to "any addition of a pollutant . . . from a [human being]" (Pet. App. 42a) (emphasis added). Trying to rationalize how the statute could be applied in this case and yet deemed inapplicable when a person flings a candy wrapper or urinates into the waters, Judge Korman went on to re-craft the rule, not found in the Act, by which the term "point source" should be read

> to include any discrete and identifiable conduit -- including a human being -- designated to collect or discharge pollutants produced in the course of a waste-generating activity.

(Pet. App. 42a). Judge Korman did not, however, explain what is meant by "designated" to collect or discharge pollutants; nor did

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[5](...continued)
but it does not show an intent to include within its definition of "discrete, discernible conveyance" something like a human being that just does not fit within the Act's terms.

he point to any place in the statute where that limitation, or the limitation "produced in the course of a waste-generating activity", might have come from. Nor, indeed, did the court explain why that definition would in fact exclude a human being who urinates in the water, given that a human body involves many "waste-generating activities" and produces pollutants.

The district court went on to hold that, as to the counts dealing with the September 1988 discovery of the vials in the bulkhead, there was also "an independent basis" to hold that Villegas' conduct was within the Act: Even if a human being were not a "point source", the rocks forming the bulkhead at the condominium complex "comes within the definition of that phrase" (Pet. App. 43a). Alternatively, the district court continued, "even if the bulkhead does not constitute a 'point source,' the very containers holding the blood vials" can be deemed a "point source" because they are also "containers" (id.). Thus, although the jury was never charged on any of these shifting and novel theories of criminal liability (a factor that rendered the convictions unsustainable for reasons stated in the footnote below)[6] -- and despite the fact that this "anything-can-be-a-

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[6] At oral argument, District Judge Korman indicated that the theory he was considering was based on a new way of looking at the statute and that the "appropriate question" was "[w]hether pollutants were generated during the course of a continuous waste generating activity and then deliberately dumped from a discrete and identifiable point" (9/16/91 Tr. 7). The court concluded that, because under that theory, the defendant was "generating" pollutants" and deliberately "dump[ed] them from a discrete and identifiable point", the defendant could be liable under the Act.

(continued...)

conveyance"-type of rationale suggests even more strongly that the formulation reads out of the statute entirely the concept of "discernible, confined and discrete conveyance" that is an element of the definition of "point source" -- the district court held that these grounds, too, warranted sustaining the charges.[7]

E. The Court of Appeals' Decision: The Court of Appeals' majority first held that the district court's "post-verdict definitional efforts" to arrive at an alternate theory upon which to sustain the convictions ran afoul of this Court's decision in

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[6](...continued)
Judge Korman acknowledged that this theory was "not precisely what [he] charged the jury"; however, he believed that this shift was not "significant" because "the facts are not really in dispute here" (9/16/91 Tr. 8). With all respect to Judge Korman, his belief in this instance is just not in accord with the principle that an uncharged theory cannot be used to salvage a criminal conviction. Chiarella v. United States, 445 U.S. 222, 236-37 (1980); Rewis v. United States, 401 U.S. 808, 814 (1971); Dunn v. United States, 442 U.S. 100, 106-07 (1979)). As these cases show, when legal theories are not submitted to the jury, it is inappropriate to later inject them as a basis to sustain a conviction.

[7] The district court then went on to grant the Rule 29 motion as to the "knowing endangerment" counts, counts One and Three. The court held that to satisfy that provision, a discharge must "actually place another person in imminent danger of death or serious bodily injury", not merely create a "potential" consequence (Pet. App. 49a). The district court also held that the defendant must know that such a "high probability" of danger existed at the time pollutants are discharged into the waters (id.), and concluded that the evidence did not sustain a finding that respondent was so aware (Pet. App. 52a). The court further held that its previous instruction to the jury -- that some lesser degree of probability would suffice -- was wrong. As a consequence, the district court concluded that, even if the appellate court were to disagree that the evidence was insufficient to show "knowing endangerment", a new trial would be required at which proper jury instructions are provided (Pet. App. at 49a-50a n.5).

Chiarella v. United States, 445 U.S. 222, 236 (1980) (court may not affirm conviction on basis of theory not presented to jury). Since, though the government had argued at trial that a human being was a point source, the district court, rejecting that suggestion at the time, took the issue from the jury and charged that "[r]emoving pollutants from a . . . vehicle . . . parked next to a navigable body of water and physically throwing the pollutant into the water constitutes a discharge from a point source" (Pet. App. 65a), the Court of Appeals held that there would be a "serious problem" in upholding the conviction on the basis that a human being is a point source" (Pet. App. 7a).

The more significant problem, however, said the majority, was that, as the district court's analytical struggle only highlighted, "the statute was never designed to address the random, individual polluter" such as respondent.

The majority first looked to the language and structure of the Clean Water Act. Although the statute defines "point source" in nonexclusive terms (as quoted in the footnote below),[8] the terms used in the statute neither include a "human being", nor "conjure up" the image of a human being as the type of

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[8] 33 U.S.C. § 1362(14) defines "point source" as follows:

> The term "point source" means any discernible, confined and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

"discernible . . . conveyance" that Congress meant to target in enacting the Clean Water Act. Moreover, as the majority aptly noted, "[h]ad Congress intended to punish a human being who polluted navigational waters, it could readily have said: 'any person who places pollutants in navigable waters without a permit is guilty of a crime'" (Pet. App. 8a).

More than simply being a case of an omission of the term "human being" from the definitional "point source" section of the statute, the majority agreed that the Clean Water Act as a whole uses the term "point source" in a way that refers to fixed industrial plants, and simply does not make sense when applied to an individual polluter (or his or her personal automobile). The majority cited as examples 33 U.S.C. § 1311, which refers to the "owner or operator" of a "point source"; § 1311(e), which requires that effluent limitations "be applied to all point sources of discharge"; § 1311(g)(2), which allows an "owner or operator of a point source" to apply to EPA for modification of its limitations requirements; § 1342(f), which refers to classes, categories, types and sizes of point sources; and a host of other references, all of which make it clear that individual pollution was not what the statute was meant to cover. "As the statute stands today," the majority concluded, "the term 'point source' is comprehensible only if it is held to the context of industrial and municipal discharges" (Pet. App. 9a).

The majority next noted that, though the purpose of the Clean Water Act is broad and admirable, the mere declaration of a

broad purpose could not substitute for "comprehensible" meaning. The majority quoted the words of Senator Robert Dole, whose words in discussing the 1972 amendments to the Act suggested, as did respondent below, that a human polluter is more akin to "non-point source pollution", which is not within the meaning of "discharge" and thus not covered by the Act, than to "point source" pollution, which is covered by the Act's terms, because the Act was designed to apply to sources of pollution that "confine [their] polluting discharge to [a] specific outlet". Senator Dole's quoted words are:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus a feedlot would be considered to be a non-point source as would pesticides and fertilizers.

(S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3760, quoted at Pet. App. 11a (emphasis added)). The majority found no suggestion "either in the act itself or in the history of its passage" that Congress intended to reach pollution caused by individuals who "do[] not confine [their] polluting discharge to one fairly specific outlet".

Finally, looking to case law under the Act, the majority found that, unlike this case, there was a clear "point source" -- one that fit comfortably within the terms of the definitional section of the Act, and within an industry targeted by Act as well -- in the prior criminal cases decided under 33 U.S.C. § 1319(c) (see cases cited at Pet. App. 13a). Noting that, while

there may have been "greater flexibility of interpretation" in civil cases, see Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) ("point source" includes bulldozing equipment discharging dredged materials onto wetland), there is no room for ambiguity in criminal cases because of the rule of lenity, the majority also determined that none of the civil cases -- and not even the broad dicta in one of the earliest civil cases, United States v. Earth Sciences, Inc., 599 F.3d 368, 373 (10th Cir. 1979), to the effect that the Act embraces "the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters" in order to effectuate the purposes of the act -- provided a sufficient basis to make the "leap" to including a human being in the statutory language since such a construction would "do[] violence to the language and structure of the CWA" (Pet. App. 14a).

So, too, the majority noted, even in the regulations of the EPA itself -- the agency whose interpretations are entitled to "deference" -- there was no support for the broad position that an individual is a "point source" of pollution. Rather, the EPA regulation (40 C.F.R. § 122.2) provides that "discharge" of a pollutant includes "discharges through pipes, sewers or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works", and does not include "an addition of pollutants by any 'indirect discharger'" (Pet. App. 15a). Adopting the government's theory, the majority concluded, "would effectively read the 'point source' element of the crime

out of the statute" (Pet. App. 15a). Because the meaning of "point source" was thus at least ambiguous, the rule of lenity prohibited a conviction on these facts.[9]

Judge Oakes, in dissent, stated that he did not agree that a person "can never be a point source". Starting with the proposition that, though the "classic" point source is "something like a pipe", there were other "discernible, confined and discrete conveyances" that have also been deemed point sources by various courts (Pet. App. 19a-21a), Judge Oakes determined "in short" that the term "point source" "has been broadly construed" to cover "a wide range of polluting techniques" and that it should be broadly construed. Apparently recognizing that the Act was not completely limitless, however, Judge Oakes fashioned his own formulation for exclusions from the Act's coverage -- which carried no citation to any provision of the Clean Water Act -- that "polluting techniques" were within the Act

> so long as the pollutants involved are not just humanmade, but reach the navigable waters by human effort or by leaking from a clear point at which waste water was collected by human effort.

(Pet. App. 21a). Judge Oakes then determined, with a quotation to the early Earth Sciences case, supra, 599 F.2d 368 (10th Cir.

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[9] The majority determined that, because it was dismissing the charges for a failure to prove a "point source", the same defect existed vis-a-vis the "knowing endangerment" counts. The majority thus did not address the government's claim that the district court had applied the wrong standard of "knowing endangerment" or that the evidence had been sufficient to prove the enhanced offense.

1979)[10] (certiorari was apparently never sought in Earth Sciences, and the decision has been criticized),[11] that a "broad reading" of "point source" along the lines he had just formulated was "essential to fulfill the mandate of the Clean Water Act". (Pet. App. 22a, quoting 599 F.2d at 373).

Judge Oakes recognized that the term "point source" must also be read to "set[] significant definitional limits on the reach of the Clean Water Act" (Pet. App. 23a). His reason for this conclusion was based on what he termed the "assumption" of most cases and commentators that "all water pollution is either point source pollution or nonpoint source pollution" (Pet. App. 23a n.2), and the view stemming from that assumption and from the Act's broad goals that the Act covers all "point source" pollution and "exempts" only "nonpoint source discharges" (Pet. App. 23a). Though the Act does not define "nonpoint source", Judge Oakes offered his suggestion of what that term means, though again this determination carried no citation to any provision of the Act. Deviating from the description given by Senator Dole that "a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific

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[10] The court in Earth Sciences had expressed the view that "it contravenes the intent of the [Act] . . . to exempt from regulation any activity that emits pollution from an identifiable point".

[11] Earth Sciences was criticized by the D.C. Court of Appeals in National Wildlife Fed'n v. Gorsuch, 224 U.S. App. D.C. 41, 693 F.2d 156 (D.C. Cir. 1982), in which the EPA had taken contradictory positions.

outlet such as a sewer pipe", which the majority had quoted (Pet. App. 11a), Judge Oakes concluded that

> Nonpoint source pollution is, generally, runoff: salt from roads, agricultural chemicals from farmlands, oil from parking lots, and other substances washed by rain, in diffuse patterns, over the land and into navigable waters.

(Pet. App. 23a-24a).

Apparently finding no provision in the Act itself that supported the view that only the conditions identified by Judge Oakes as "non-point source" pollution were "exempted" from the Act, Judge Oakes pointed instead to a publication the EPA: EPA Office of Water, Officer of Water Regulations and Standards, Nonpoint Source Guidance 3 (1987) (cited at Pet. App. 24a n.3). That document, however, defines "nonpoint source pollution" only with the circular definition that it is pollution "caused by diffuse sources that are not regulated as point sources".[12] Judge Oakes nonetheless continued with his analysis by suggesting that the rationale for treating point and nonpoint sources differently was that nonpoint sources are "more difficult to control" (Pet. App. 25a). Because "point sources" are known, and

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[12] The EPA publication goes on to state that the concept

> normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. Such pollution results in the human-made or human-induced alteration of the chemical, physical, biological and radiological integrity of water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

thus easier to control, the dissenter concluded that Congress must have meant to control all identifiable sources of pollution as "point sources".

Judge Oakes acknowledged that respondent's activities "were not prototypical point source discharges" since respondent could have disposed of the pollutants on land and "so did not need a permit or a pipe" (Pet. App. 26a). However, the dissent concluded, because the discharge "was [supposedly] directly into the water, and came from an identifiable point", this must be a "point source" discharge within the Act.

Judge Oakes also opined that it was not necessary "to determine whether it was Villegas himself who was the point source, or whether it was his car, the vials, or the bulkhead". This was because, to Judge Oakes, "the entire stream of Mr. Villegas' activity functioned as a 'discrete conveyance' or point source" (Pet. App. 26a). Just because Congress did not list this method of disposing of waste in the statute, Judge Oakes said, that should not mean that the Act should be deemed ambiguous as to its intent to cover respondent's conduct (id.) Were he to read the Act any other way, Judge Oakes said, it would "encourage corporations perfectly capable of abiding by the Clean Water Act's requirements to ask their employees to stand between the company trucks and the sea, thereby transforming point source pollution (dumping from trucks) into nonpoint source pollution" (Pet. App. 27a).

After expressing his views on the matter, Judge Oakes turned to the majority's counterarguments. Though he "granted" that it "sounds odd" to read the term "point source" to include a "person" when it would lead to a statutory statement prohibiting "any addition of any pollutant to navigable waters from a person by a person", that "oddity" could be cured if one did not "assum[e] that the term 'person' means the same thing in both parts of the sentence, and that in both cases it means what it means in everyday language". Judge Oakes' solution was to use the "first term 'person'" to mean "'a person acting as a point source'" and the second term "person" to mean a "responsible party" (Pet. App. 28a-29a).

Judge Oakes went further -- opining that a person "can be both point and nonpoint sources of pollution" (Pet. App. 28a n.6 (emphasis added)), depending on whether he or she "deposit[s] waste directly into water", in which case the person is a "point source", or "spread[s] fertilizer on the ground or deposit[s] oil in a driveway", in which case the person is a non-point source of pollution.

Judge Oakes admitted that he was "given pause . . . by the nature of the criminal sanctions" under the Act. Though given his broad definition, the Act could include "intentionally throwing a candy wrapper into the ocean" -- which Judge Oakes was though Congress had probably not intended the Act to cover (Pet. App. 29a-30a) -- Judge Oakes fashioned his own formulation of the limitation by "read[ing] the statute as ambiguous as it pertains

to individual litterers, as opposed to disposers of industrial and municipal waste" (Pet. App. 30a).

Judge Oakes concluded that, since there was no "essential" dispute as to facts, there should be no difficulty in sustaining the verdict even though the jury did not expressly find guilt based on Judge Oakes' formulation. Nor, said Judge Oakes, did the rule of lenity require reversal, because, even though some human pollution was to be excluded from the Act's coverage, the statute was, to him, unambiguous "with respect to an individual physically disposing of medical wastes, in quantity, directly into navigable waters, by means of a controllable, discrete conveyance and court of action" (Pet. App. 31a).

ARGUMENT

THE WRIT SHOULD NOT BE GRANTED

The government seeks a writ of certiorari because of the supposed "mistake" by the Court of Appeals in deeming the Act's "breadth" an "ambiguity. Accusing the majority of "creat[ing] a non-textual requirement" that is "incapable of principled administration", the government urges review by this Court on the ground that the Court of Appeals' reading of the Act "conflicts with the Act's plain language".

Although the government seizes on the statutory word "any" and argues that, as District Judge Korman and dissenting Judge Oakes concluded, the use of the term signifies Congress' intent

to cover the conduct at issue here,[13] the term "any" does not stand alone: it precedes the phrase "discharge of any pollutant". While seemingly a broad and encompassing phrase, the term "discharge" is limited by the statutory definition: "any addition of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12). Like it or not, the term "point source" limits the reach of the Clean Water Act. The Court of Appeals properly interpreted the statute as having not been intended to cover the random individual pollution caused by Geronimo Villegas. Indeed, it is the government, as well as District Judge Korman and dissenting Judge Oakes, who urge a "non-textual requirement", simply to shoehorn an individual's pollution into the statute's terms: they would subject an individual to criminal liability if the source of the pollution was "industrial waste", but not otherwise. Such a limitation of the word "pollutant" does not exist in the statute. The Court of Appeals correctly determined the issue before the Court.

The government claims, however, that the definition of "point source" is not "susceptible to [the supposedly] narrow interpretation" given it by the Second Circuit majority, and further claims that, whether it includes human beings or not, the term "clear[ly]" includes respondent's automobile, supposedly used to transport blood to the bank of the Hudson River (Petition

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[13] As Judge Oakes and District Judge Korman noted, the phrase "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12).

9-10) since it is a "conveyance". (See also Petition at 11 (issue whether human "conveyance" is within Act is "not pertinent to the validity of respondent's conviction" since jury was charged that "vehicle was the statutory 'conveyance'")).

Notwithstanding the government's argument, even if a personal automobile could be deemed a "point source" without doing violence to the statutory language, the conduct would still not be within the Clean Water Act because respondent took the vials out of the car before they came anywhere near the navigable waters. It was respondent, not the vehicle, who "added" the pollutant to the bulkhead. There was thus no discharge "from" any point source, as the statute requires.

The term "discharge", again, is thus defined as "any addition of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12) (emphasis added). Just as the government claims the word "any" cannot be deemed surplusage, nor is the word "from" mere surplusage. Indeed, it was the basis of a holding by the United States Court of Appeals for the District of Columbia Circuit -- not cited by the government in its petition[14] -- that the EPA did not have a duty to require dam

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[14] The government argues that the Second Circuit "cited no statutory language" calling for an "exception" to liability for discharges by one's personal vehicle when there is the "intervention of a human being between that conveyance and the water" (Petition at 11). The government further suggests in a footnote (Petition at 11 n.3) that, though the Second Circuit's analysis "appears to be based on th[e] assumption" that the Act requires that the "last chain in the link of conveyances itself be a 'point source'", "nothing in the act requires it". Id.

(continued...)

operators to apply for certain pollutant discharge permits under the Act. National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982). The issue in the case was not whether the dams contributed to pollution: they did. Further, there was no issue that certain "conveyances" in dams were point sources for some purposes: the spillways through which water flowed from reservoirs through the dams had been determined to be "point sources" by the EPA in the past. 693 F.2d at 165 & n.22. Instead, the sole issue was whether the water quality changes that resulted from release of water through the dams constituted the "discharge of a pollutant" as that term is defined under 33 U.S.C. § 1362(12) such as to require the EPA to regulate dams.

According deference to the EPA's position on the matter, the Court of Appeals held that the EPA had no duty to regulate dams. The EPA's position was that the "addition [of a pollutant] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world" -- that the "point or nonpoint character of pollution is established when the pollutant first enters navigable water . . . ." 693 F.2d at 175. Since in Gorsuch the polluted water passed through the dam from one body of navigable water (the reservoir) to the other

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[14](...continued)
As discussed in the text above, however, the statute pertains to additions of pollutants "from" point sources, and the EPA believes that the Act does require that the "last chain in the link of conveyances itself [must] be a point source". The language of the Act would be meaningless if the Act were read as the government wishes.

(the downstream water), the pollutant had not been added "from" the dam, and it was thus not a "point source".

For the same reasons as in Gorsuch -- under the EPA's reasonable and judicially approved position -- there was no discharge "from" Geronimo Villegas' vehicle. Even if one's personal automobile could otherwise be deemed a "point source", there was thus no criminal violation of the statute here.

In positing that the automobile is a "point source" and the conduct a "discharge" within the meaning of the Clean Water Act, the government -- though acknowledging that "the language actually enacted by Congress" controls the interpretation of the statute (Petition at 12, citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 & n.13 (1985) -- offers a conclusion drawn from only one word of the statute: "conveyance". That word, however, is not only limited by words that the government and, indeed, many prior court decisions have not sufficiently analyzed, preferring instead to speak of the broad goals of the statute, but it is given its context and content from the words used by Congress through the statute, all of which must be read in conjunction and none of which should be rendered superfluous by a court's construction of a portion of the statute. See United States v. Campos-Serrano, 404 U.S. 293, 301 & n.14 (1971), quoting Market Co. v. Hoffman, 101 U.S. 112, 115-116 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can

be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant").[15]

The Court of Appeals' rightly concluded, through a sound analysis of the statute itself, that the language and structure

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[15] In Campos-Serrano, this Court held that possession of a counterfeit alien registration receipt card was not an act punishable under 18 U.S.C. § 1546, which criminally punishes one who "knowingly . . . possesses" any "immigrant or nonimmigrant visa, permit, or other document required for entry into the United States". While the INS at the time permitted an alien registration card to be used for an alien's re-entry into the United States, it was not a "required" document. This Court, invoking the rule of lenity, said (citations omitted):

> It has long been settled that "penal statutes are to be construed strictly," . . . and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it," . . . "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." . . . In § 1546, Congress did speak in "clear and definite" language. But, taken literally and given its plain and ordinary meaning, that language does not impose a criminal penalty for possession of a counterfeited alien registration receipt card. Alien registration receipt cards may be used for re-entry by certain persons into the United States. They are not required for entry.
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> * * *
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> The language of § 1546 denotes a very special class of "entry" documents -- documents whose primary raison d'etre is the facilitation of entry into the country. The phrase, "required for entry into the United States," is descriptive of the nature of the documents; it is not simply an open-ended reference to future administrative regulations.

The Court's words apply equally in this case. "Point source" is "descriptive" of an origin of pollutants. Dissenting Judge Oakes' suggestion that a human being can be a point source if the pollutants he carries consist of "industrial and municipal waste" instead of "individual litter[]" merely substitutes Judge Oakes' predilection of what the statute should have covered for what it does cover.

of the Act as a whole demonstrate that individual pollution was not what the Clean Water Act was meant to cover. It meant to regulate some pollution, not to regulate all pollution with only some exceptions, as district judge Korman, dissenting Judge Oakes, and the government contend.

Indeed, in enacting the Clean Water Act, Congress specifically recognized that it is the "primary responsibilit[y]" of the States to prevent, reduce, and eliminate water pollution, 33 U.S.C. § 1251(b).[16] Accord, American Paper Institute v. United States Environmental Protection Agency, 996 F.2d 346, 302

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[16] The respondent caused the pollution from his home in New Jersey. New Jersey, in fact, commenced a prosecution against respondent and Plaza Health Laboratories, but dismissed the criminal case. It was only after the dismissal that the federal prosecutors took up the torch, so to speak, and tried to cram this case into the gaps of the Clean Water Act because of their sense that there should be some criminal punishment. Of course, the prosecutors, like the judges of the federal courts, are not legislators. Their sense of outrage is no substitute for a statute that reaches the conduct at issue.

Nor should the federal authorities worry that the State cannot protect the waters. New Jersey has a comprehensive code that regulates and even criminalizes pollution. See N.J. Stat. 58:10A-6 (entitled "Regulation of discharges of pollutants; permits; exceptions; right of entry; regulation by local agency; inspections; priority pollutant analysis; public access to records"). Section "a" of the statute as it stands today makes it "unlawful for any person to discharge any pollutant, except in conformity with a valid New Jersey Pollutant Discharge Elimination System permit that has been issued by the commissioner pursuant to this act or a valid National Pollutant Discharge Elimination System permit issued by the administrator pursuant to the Federal Act, as the case may be." Whether or not this provision would have criminalized respondent's conduct at the time in question, the State is perfectly able to enact legislation and enforce anti-pollution laws. If the statutes were not sufficient to cover respondent's conduct at the time, the remedy is not for the courts to legislate, but to invoke a legislative cure.

U.S. App. D.C. 80 (D.C. Cir. 1993) (discussing "Congress' intent to cast the states in the featured role" under the Clean Water Act). Congress' purpose was to place some federal controls on pollution of the nation's waters: those controls included regulation of industrial sources of discharges of pollution, and were accomplished by authorizing the Administrator of the Environmental Protection Agency (EPA) to establish limitations (called "effluent limitations"[17]) on "permissible" levels of discharge of toxic and other pollutants by "sources" to be identified by the Administrator (with the help of the States) as "point sources" and categorized.

Congress did not totally prohibit the "discharge" of "pollutants" -- not even "toxic pollutants"[18] that can cause great harm to the life and health of the citizenry. Rather, it expressed as a policy goal the elimination of pollution in the

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[17] "Effluent limitation" means "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . , including schedules of compliance." 33 U.S.C. § 1362(11).

[18] The term "toxic pollutant" means (33 U.S.C. § 1362(13))

> those pollutants . . . including disease-causing agents which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions . . . or physical deformations in such organisms or their offspring.

future,[19] provided monies for studies and regulation, and required "point sources" to obtain permits in order to lawfully discharge pollutants into the waters. The discharges would have to comply with whatever limitations were set by the State and federal governments. There were also reporting and record-keeping requirements established by the Act.

In framing such a necessary and commendable (though as yet unachieved) policy, the sense of Congress thus incorporated a recognition that, while all pollution should be eliminated, every instance of pollution will not necessarily constitute a violation of the Clean Water Act. Further, unlicensed instances of pollution are wrongful only if "discharges" of "pollutants" occur "from" a "point source" into the "navigable waters".

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[19] The 1972 Amendments established 1985 as a desired date for the total elimination of discharges of pollution, and set as a policy goal that toxic pollutants "in toxic amounts" should be prohibited. 33 U.S.C. § 1251. The goal of elimination has obviously not been met. Nor has toxic pollution been significantly controlled. As reported in the 1989 Environmental Reporter, 19 Env. Rptr. 2573 (April 7, 1989), the National Toxic Campaign was complaining that over 2000 pounds of toxic substances were being discharged into the Boston Harbor each day, and that most of the 1500 companies involved in the discharges were in compliance with permits and with State regulations.

The definition of "point source" in 33 U.S.C. § 1362(14)[20] cannot include everything that could arguably "convey" a pollutant. If Congress had meant that, it no doubt would have -- and easily could have -- said so clearly. Instead of saying: "Any person who places pollutants in navigable waters without a permit is guilty of a crime", what it did say is completely inconsistent with applying the statute to a human being who pollutes and shows an intent, as the Second Circuit majority properly accepted, to regulate industries and industrial waste from fixed and identified plants. As shown in the footnote below[21] and discussed by the Second Circuit majority (at

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[20] Again, the definition is:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

[21] For example, 33 U.S.C. § 1342(f), entitled "Point source categories", requires the EPA Administrator to "establish[] categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section", and allows the Administrator to "distinguish among classes, types, and sizes within any category of point sources." One wonders how the Administrator would "distinguish among classes, types, and sizes" of human beings or personal vehicles.

Likewise, 33 U.S.C. § 1316(d) refers to "any point source the construction of which is commenced after October 18, 1972". This language also is hardly explainable in terms of an individual's pollution. Finally, by way of example, 33 U.S.C. § 1318 provides that the EPA Administrator "shall require the owner

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Petition 8a-9a), "the term point source is used throughout the statute, but invariably in sentences referencing industrial or municipal discharges" and plants".

The legislative history is consistent: Not only does the Senate Report discuss how the permit system "establishes a direct link between the federal government and each industrial source [emphasis added] of discharges into the navigable waters" (1972 U.S. Code Cong. & Admin. News 3668, at 3675), but there are numerous other similar references in the historical documents that cannot be reconciled with a holding that an individual or his personal automobile should be treated as a "point source". E.g., U.S. Code Cong., supra, at 3710 (refers to the application of technology to "industrial point sources"); id. at 3723 (stating that the new "sources" of pollution in twenty-eight specified industries are to be constructed to meet "no-discharge" limitations if possible, and then identifying industrial "groups" such as pulp and paper mills, paperboard industry, meat product processing, dairy processing, rubber processing, etc.); id. at 3728 (discussing how the "owner" of an "effluent source" should install monitoring equipment); id. at 3737 (discussing permits, and indicating that the Act will allow the Administrator to establish "classes and categories of point sources" for which no permit-by-permit review will be undertaken); and id. at 3736

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[21](...continued)
or operator of a point source" to establish and maintain records, make reports, install monitoring equipment, and do a variety of other things that make no sense when applied to an individual who pollutes.

(citing studies that reveal that there are at least 40,000 industrial sources of discharges into the navigable waters). (Of course, if every vehicle owned by an individual were counted, there would be many, many more than 40,000 sources.) Further, the regulations of the EPA themselves are consistent with the view that the federal regulation concerns various identified industries (as noted in the footnote below) and demonstrate the Agency's understanding that the Act regulates industries, not individual persons.[22]

In accord is this Court's discussion of the Act in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977). That case involved an issue of regulation of "point sources" that existed on the effective date of the 1972 Clean Water Act, which were to be subject to certain limitations, and of "new sources" (those to

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[22] E.g., 40 C.F.R. § 469.10 et seq. (Electrical and electronic components point source category); 40 C.F.R. § 403.1 et seq. (General pretreatment regulations for existing and new sources of pollution); 40 C.F.R. § 420.01 et seq. (Iron and steel manufacturing point source category); 40 C.F.R. § 433.10 et seq. (Metal finishing point source category); 40 C.F.R. § 463.1 et seq. (Plastics molding and forming point source category).

The EPA has taken other action to show its understanding that "point sources" intended to be covered are standing facilities. Thus, as reported in the Environmental Reporter, 19 Env. Rptr. 1908 (January 27, 1989), the EPA proposed a rule directing States to draw up lists of contaminated waterways and "sources" as a measure under the 1987 amendments to the Clean Water Act, which require States to identify waterways with toxic contamination and to identify sources of that contamination. Plainly, it was contemplated that the State would be identifying fixed plants, not movable cars. To the extent that the definition of "point source" in the statute includes "rolling stock" or other "conveyances", we suggest that what Congress meant to cover were conveyances such as railroad equipment within some "confined" location which is a regular part of that facility.

be constructed later), which under the Act were to be limited more strictly.[23] In the course of the opinion, Justice Stevens discussed various terms of the Act in a way that makes it plain that "point sources" involve structures -- such as those mentioned in the definitional section of the Act -- within some plant or location that is "confined" -- one of the operative terms in the definition of "point source". See 430 U.S. at 117 n.4.[24] Indeed, Justice Stevens, in his discussion of the issues, substitutes the term "classes of plants" for "classes of point sources", thus indicating that a fixed plant is the minimum required for a "source" to be a "point source".

Obviously, there is no "class" of sources that is defined -- or that could reasonably be defined -- as cars driven to bulkheads by individuals carrying "pollutants" (a term which

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[23] 33 U.S.C. § 1316(c), quoted at 430 U.S. at 120 n.8, thus states that

> [a]fter the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

The statute obviously does not speak to how one's private vehicle is "operated", but rather connotes a "facility" and its various pollution-discharging parts.

[24] The Court also noted, 430 U.S. at 120, that the Administrator was directed by the Act to publish within 90 days "a list of categories of sources discharging pollutants". To the extent that the statute leaves it to an agency to further define the meaning of one of its criminal terms, there can be no proper finding of criminal liability where, as here, the Administrator has never defined as a "point source", prior to indictment, whatever entity the indictment alleges as a point source. That would hardly be notice.

includes just about anything other than pure water). The mere fact that the pollutants carried at one time in the automobile were traceable to a business and the "source" was thereby in fact "identified" as a "waste-generating activity" (to use the limiting principle fashioned by the district court but nowhere found in the statute) -- or that the individual who polluted was disposing of "industrial [or] municipal waste" and not "litter" (to use Judge Oakes' legislative effort) -- does not turn one's automobile into a "point source". The government's construction that would include a human being within the Act only at some times, depending on how one classifies the "waste" he carried to or near a navigable waterway, is a distinction not made within the statute itself and one that is at war with the language and history of the Act. A "point source" is not defined by the nature of the pollutant.[25]

Nor does any case cited by the government, or any other case for that matter, compel a conclusion that Mr. Villegas or his car can properly be characterized as a "point source". Though the government argues that the decision below "conflicts with decisions from other circuits, which have recognized that the plain language of the Act embraces a broad array of polluting

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[25] To the contrary, the "litter" of human beings is more like rain runoff -- the prime example of a non-point source -- than a point source. Generally, the source of such litter is not readily identifiable.

Even if a "litterer" can be identified, with the Act as it now stands, Congress left it to the States to impose penalties.

conduct that is logically indistinguishable from respondent's activities" (Petition at 15), the government is wrong: no case deals with individual pollution or holds an individual or his personal vehicle a "point source". To the extent that courts -- such as the Court in Earth Sciences, supra, 599 F.2d 368 -- have employed broad dicta concerning the "breadth" of the term "point source" because of the goals of the Clean Water Act, the holding of the case is not entirely inconsistent with this case, because it does not deal with individual pollution as does this case. No one comparing the decision in this case with that in Earth Sciences -- a case in which certiorari was apparently not sought in this Court and the holding of which has been criticized in any event -- should be confused by the actual reach of the statute. One who reads the Second Circuit decision in this case and compares it to any of a number of prior cases that used broad dicta but did not adequately analyze the issue, will know that, to the extent they seek to hold individuals responsible for pollution, they should go to the State authorities or seek an amendment of the statute from Congress.[26]

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[26] As the Second Circuit majority realized, most of the prior civil cases do involve "conveyances" in fixed ("confined") locations, thus giving no basis to reach the conclusion that a broad construction covers the conduct at issue. E.g., Avoyelles Sportsmen's League v. Marsh, 715 F.2d 879, 922 (5th Cir. 1983) (bulldozing equipment discharged dredged materials into wetlands as part of a fixed agricultural activity). To the extent that the cases suggest a broader reach, they were not decided in a criminal context, where the rule of lenity applies.

Nor does the Court of Appeals decision suggest, as the government claims it does (Petition at 16), that "the same

(continued...)

Congress may now think that it has the powers to penalize individual polluters of the waters and may wish to use those powers, but either it did not think so at the time it enacted the Clean Water Act, or decided that the States should be responsible for such pollution. In any event, Congress certainly did not plainly include conduct such as that of Mr. Villegas in the Act's coverage; had it wished to do so, it would have, and should have, stated succinctly: "Any person who pollutes the navigable waters by placing pollutants in those waters without a permit is guilty of a crime." This plain forewarning was not given because it was not what Congress meant to cover when it enacted the "point source" regulations in the Clean Water Act. See United States v. Campos-Serrano, supra, 404 U.S. at 299 ("The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute.") The government's remedy in this case is not with this Court: it is with Congress.

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[26](...continued)
statutory language" should be interpreted "differently depending on the civil or criminal nature of each particular case". Aside from the fact that the cases it cites do not support the proposition that interpretation of the criminal statute should not be undertaken with less "flexibility", the Court of Appeals' decision only reflects the fact that, where a statute has criminal application, as here, the rule of lenity must be invoked when one reaches a place where two interpretations both make sense. This, indeed, is the same theory as applies to issues of whether a court should sustain an agency's own interpretation of a statute. See Gorsuch, supra, 693 F.2d 156 (D.C. Cir. 1982) (upholding EPA's decision that dams were not point sources because both sides' interpretations were reasonable and the law requires deference to an agency's determination when that is so).

CONCLUSION

The Supreme Court has no need to take this case. If the prosecutors are not happy with the result, their remedy is to seek an amendment of the Act from the Congress of the United States. A writ of certiorari should not be granted.

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